IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT WORKERS LOCAL 1005,

Union

and

METRO TRANSIT, A DIVISION OF METROPOLITAN COUNCIL,

Employer

ARBITRATION DECISION AND AWARD

BMS Case No. 06-PA-1183
(Discharge Grievance)

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	October 5 and 13, 2006
Date Record Closed:	October 13, 2006
Date of Award:	November 20, 2006

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

Amalgamated Transit Union Local 1005 ("ATU" or "Union") represents bus operators employed by the Metro Transit division of the Metropolitan Council ("Metro Transit" or "Employer") as set out in its Labor Agreement ("Contract"), effective August 1, 2005 through July 31, 2008. Metro Transit is a public entity in the business of providing safe public bus service to the citizens of the Minneapolis and St. Paul metropolitan area.

The employer discharged Grievant[1], a bus operator, on April 5, 2006, and this grievance was filed. The parties proceeded through three steps of the Grievance process pursuant to Article 5 of the Contract, but were unable to resolve the dispute, and the matter was referred to arbitration. The parties selected a neutral arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

A hearing was held at the offices of Parker Rosen in Minneapolis, Minnesota, on October 5, 2006. At the end of that day, the parties decided to schedule an additional day of hearing, October 13. During these two days, the arbitrator heard sworn testimony subject to cross-examination, and accepted exhibits into the record. The hearing concluded with oral arguments on October 13, 2006.

ISSUE

Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

FACTS

The Grievant has been employed by Metro Transit as a Bus Operator for nearly 10 years. At the time of her discharge on April 5, 2006, her job was classified as full time Operator, and she worked out of the Heywood Garage.[2] The discharge notice cites the following grounds for discharge:

- Gross Misconduct, Fraudulant *(sic)* use of FMLA leave, Falisification (*sic)* of a statement(s) to a manager's inquiry
- Violation of Metropolitan Council Drug/Alcohol policy
- Overall Record[3]

A. Fraudulent use of FMLA leave.

[1] The Grievant's name will not be used in this opinion in order to protect data that may be private pursuant to Minn. Stat. Ch. 13.01, *et.seq.*, the Minnesota Government Data Practices Act.
[2] Joint Exhibit 2.
[3] *Id.*

The first reason for discharge, fraudulent use of FMLA, is based on facts from which the Employer concludes that the Grievant deliberately manipulated its absentee reporting system so that she would be allowed more sick leave time than other similarly situated employees. The sick leave system includes a multi-step computer tracking process encompassing both the Employer's no fault absenteeism policy and the separate requirements of the Federal Family Medical Leave Act ("FMLA").[4] The employee who suffers from a serious health condition must take steps to be certified as eligible for FMLA leave. After the certification process is completed, the employee who suffers intermittently from a qualifying illness must report an FMLA certificate number to her supervisor each time she claims that an absence should be attributed to an FMLA certified condition.[5] The advantage of attributing one's illness to an approved FMLA health condition is that a day off for this condition does not count as an "occurrence" under the Bus Operator Absenteeism Policy.[6] The Absenteeism Policy provides that disciplinary action may be taken after a specific number of occurrences in a rolling calendar year, and thirteen occurrences in a rolling calendar year may result in termination.[7]

The Grievant's attendance at work during the past three years has been so irregular that she worked an equivalent of two work years of the last three.[8] Had all of these absences been "occurrences" under the Employer's Policy, she would have exceeded the number of absences allowed, and she would have been discharged for absenteeism, according to her supervisor, Annette Floysand, and Mark Johnson,

[4] Testimony (hereafter, "T.") of Brian Funk.
[5] *Id.*
[6] Bus Operator Absenteeism Policy, Employer Exhibit 25 at 2, Sec. IV. B.
[7] *Id.* at 2, Sec. V.B.
[8] T., Annette Floysand.

Heywood Garage Operations Manager. Nonetheless, the Grievant was, until April 5, 2006, still employed because she had repeatedly qualified for FMLA certificates and her FMLA absences had no disciplinary consequences. During an investigation of the Grievant's use of sick leave, the Employer concluded that she had intentionally claimed FMLA sick leave for a health condition causing intermittent back pain even though her FMLA certificate for this condition had expired.

The Grievant testified that she had become confused about which of her two certificates referred to her back condition and which to her depression, and that she had inadvertently attributed the wrong number to the condition from which she was suffering. The Employer countered with evidence underscoring the Grievant's long use and knowledge of the absentee system. These facts will be discussed in more detail below.

B. Violation of Metropolitan Council Drug/Alcohol Policy.

The parties agree that the following rules apply to Bus Operators:

> Employees reporting for duty must be free from the effects of alcohol, drugs and other mood-altering substances when reporting for work, on duty, or on Metro Transit property. Remember –All prescription medication which might alter mood or behavior must be reported to your manager…

Metro Transit Bus Operator's Rule Book & Guide, Sec. 473, Employer's Exhibit 20. The Rule Book also refers employees to the Metro Transit Drug Policy which specifically requires:

> Sec. 2.3 The appropriate use of legally prescribed drugs…is not prohibited. However, the use of any substance which carries a warning label that indicates that mental functioning motor skills or judgment may be adversely affected must be reported to supervisory personnel and medical advice obtained, as appropriate, before performing work-related duties.
> …
> A legally prescribed drug means that an individual has a prescription or other written approval from a physician for the use of a drug in the course of medical

> treatment. It must include the patient's name, the name of the substance, quantity/amount to be taken, the period of authorization, and whether the prescribed medication may alter job performance. This requirement also applies to refills of prescribed drugs.[9]

(Emphasis added.)

Employees are given copies of these rules and additional training.[10]

During the first week of March 2006, two bus drivers reported to the Operations Manager that they were concerned about the Grievant's ability to drive safely and her recent erratic behavior.[11] The employees testified that Grievant told them that she was driving busses while taking "morphine". At the time, she was taking OxyContin, a derivative of morphine, and Vicodin for back pain. She also stated to them that she could sell one of these individual pills on the street for $20.00. There was no evidence that she offered the pills for sale to anyone.

The Employer's drug abuse policy for bus drivers requires that an employee taking a prescribed drug must file a form including a statement from a physician about whether the prescribed medication may alter job performance.[12] The Grievant did not file forms with a doctor's approval of her use of narcotic drugs during a work day driving public busses.

The Employer also alleges additional violations of its Drug Policy. The Grievant did not report to her supervisor in a timely manner that she had taken an overdose of a morphine based drug on February 28, 2006, and that she had been hospitalized. By the time she reported the facts, she had already driven two shifts. [13] This offense could have

[9] Employer's Exhibit 18
[10] T., M. Johnson. Employer's Exhibits 27 & 28 are Grievant's signed acknowledgments of receipt of relevant policies.
[11] T., Tom Smith and Jerry Victor
[12] Employer's Exhibit 18 and 20.
[13] T., M. Johnson

been cause for termination.[14] Further, the Grievant admitted that she had been discharged from her second job as a pharmacy assistant at Walgreen's Drug store for stealing extra tablets of the narcotics prescribed by her physician for her use.[15]

C. Chronology of the Process Leading to Discharge

1. On March 14, 2006, an investigation into the Grievant's use of FMLA leave began. The investigation into Grievant's actions was conducted by Katie Shea, Director of Program Evaluation and Audit for the Metropolitan Council, who reviewed records, interviewed the Grievant, prepared a written record of the interview, and a report to Metro Transit officials.[16]
2. On March 15, Mark Johnson, Heywood Transportation Manager, prepared a last chance agreement signed by the Grievant in connection with her report of a drug overdose and hospitalization.[17] The Grievant was in compliance with the last chance agreement on March 31 when the Shea report was issued.[18]
3. The Shea report of March 31 was forwarded to Mr. Johnson who recommended to Jeff Wostrel, the Garage Operations Manager, that Grievant be discharged based on the evidence. Mr. Wostrel made the final decision. The discharge notice, dated April 5, 2006, alleges both fraudulent use of FMLA leave and violation of the Metropolitan Council Drug Policy.

EMPLOYER POSITION

The Employer argues that it discharged the Grievant for just cause. It claims she

[14] T., M. Johnson
[15] Investigator's Interview of Grievant, Employer's Exhibit 9, and T., Grievant.
[16] Employer's Exhibits 16 and 9.
[17] Last Chance Agreement, Employer's Exhibit 22. This discharge is not based on a violation of the last chance agreement.
[18] Employer Exhibit 16.

violated several important written Metro Transit rules for bus drivers: First, she used narcotic drugs and drove the bus without reporting this to her supervisor and without filing a doctor's opinion about whether use of the drugs might alter her job performance. Second, the Employer looks to her admitted theft of narcotics and subsequent termination from her second job at Walgreen's. Metro Transit argues that this conduct has a sufficient nexus to her bus operator job that it should be considered a reason for discharge as a bus driver. The Employer argues that dishonesty is itself a cause for termination, because a bus driver is in a "safety sensitive position" and members of the public may be at risk as well as the Employer's enterprise if bus drivers can't be trusted. Third, it claims that the Grievant intentionally and falsely reported nine occurrences of absences as FMLA leave from November 2005 through February of 2005 to avoid disciplinary action under the Employer's Absentee Policy. Based on these considerations, the Employer argues that discharge is the appropriate remedy.

UNION POSITION

The Union argues that the Grievant's job performance as a bus driver was at least average and thus, her overall record as a long term employee weighs against discharge. Second, it claims that the theft from Walgreen's had nothing to do with her job as a bus driver and should not be considered. Finally, the Union argues that the alleged FMLA fraud claim must fail as a basis for discharge because the evidence does not establish that the Grievant intentionally and knowingly gave the wrong Certificate Number to management; rather, she made an honest mistake. The Union seeks reinstatement for the Grievant, conditional upon a last chance agreement that requires drug treatment and appropriate follow up.

DISCUSSION AND OPINION

The Employer has the burden of establishing that there is just cause for discharge. The term "just cause" means, essentially, that the Employer has acted in a fair and reasonable manner. The Minnesota Supreme Court has had occasion to affirm the following definition:

> The term "cause" generally means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice. That is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances would regard as a good and sufficient basis for terminating the services of an employee. A termination is for cause if Plaintiff breached the standards of job performance that the Defendant established and uniformly applied.

Hilligoss v. Cargill, 649 NW. 2d 142 (Minn. 2002).

Metro Transit employees who drive public busses are held to a high standard of safety and reliability, since they operate almost entirely on their own and often find themselves in stressful situations dealing with traffic and customers. Just cause for discharge reflects these factors. If the Employer establishes that the Grievant operated public buses while taking narcotics in violation of the Metropolitan Council Drug Policy or that the Grievant knew or should have known she was taking FMLA leave to which she was not entitled, discharge would be a reasonable remedy. The quantum of evidence necessary for discharge in grievance arbitration is a preponderance of the evidence; that is, the arbitrator is persuaded that it is more likely than not that the misconduct occurred. Even if the misconduct occurred, a grievant may present mitigating circumstances that excuse the misconduct, and another appropriate remedy may be imposed.

A. The Grievant's Use of FMLA Leave. The Employer established by a preponderance of the evidence that the Grievant misused her FMLA leave by falsely reporting nine occurrences of absence as FMLA leave for back pain from November of

2005 through February 2005 when she was not entitled to them. The facts upon which this conclusion is based are these: The Grievant had two active FMLA certificates with two different identifying numbers in 2005. Number 7900 certified that Grievant suffered from a serious health condition causing back pain, and number 7915 certified that she suffered from depression. Prior to October 26, 2005, Brian Funk, the Grievant's supervisor, had correctly inserted Certificate Number 7900 in the computer program for the Grievant's back pain absences, and she viewed the computer screen with him and signed a form verifying that 7900 was the correct number. On October 26, Certificate 7900 expired by its own terms.[19] Nonetheless, the Grievant kept calling in absences for back pain that she advised her supervisor were to be credited as FMLA leave.[20]

Coincidentally, at about the same time that Certificate 7900 expired, Annette Floysand replaced Mr. Funk as the Grievant's supervisor. When the Grievant claimed FMLA leave because of back pain shortly after October 26, Certificate Number 7915 was the only FMLA current certificate number that appeared on the computer screen showing Grievant's employment history.[21] Ms. Floysand entered Number 7915 in the Grievant's history, unaware that Number 7915 certified the Grievant suffered from depression, not the back condition.[22] The Grievant, viewing the computer screen with Ms. Floysand, signed a form verifying that Number 7915 was correct. Thereafter, other absences for

[19] FMLA, Cert. Number 7900, Employer Exhibit 11A & B.
[20] T., A. Floysand.
[21] The Employer does not send employees a written notice when a certificate expires. When the Certificate is approved, the Employer sends a written notice to the employee granting the request for leave, setting out the dates covered by the Certificate, and it assigns a number to be used to describe the health condition for its internal records. The employee is advised to remember the number and report it to the supervisor when claiming leave under the FMLA. See, Employer Exhibit 12 and T., M. Johnson.
[22] Because of privacy concerns, the Employer does not provide supervisors with a description of the medical condition underlying each FMLA certificate. T., Brian Funk

back pain +were attributed in the same way to Certificate Number 7915. These actions constituted the FMLA fraud alleged by the Employer.

Although the Grievant claimed that she did not know which number referred to back pain and that her supervisor made the error when she put the number into the computer program , testimony of the supervisors, and the manager who trained employees on this subject, was more persuasive. Each FMLA absence required a meeting between the employee and the supervisor. The supervisor would confirm the dates of the FMLA leave with the employee, ask for a certificate number, and show the employee the computer screen with the certificate number and its effective dates, keeping computer records of each step in the process.

Early in 2006, Grievant applied for another certificate to cover her condition causing back pain. The application was denied on February 7, 2006, because she had not worked sufficient hours during the previous year to meet the FMLA criterion.[23] The Grievant allowed three additional absences for back pain to be attributed to Number 7915 after the application for another back pain certificate was denied.[24] If all these absences had been "occurrences" under the Absentee policy, the Grievant would have had a series of warnings for absenteeism leading to discharge. The fact that the Grievant applied for a new certificate for her back, which was denied in February 2006, lends strong support to the Employer's argument that the Grievant knew that she had no valid FMLA certificate for back pain when she claimed FMLA leave for that condition.

Other factors that support the conclusion that the Grievant knew or should have known that she was misusing FMLA leave are both her long employment with Metro

[23] Report of investigator Katie Shea, Director of Program Evaluation and Audit, Metropolitan Council.
[24] *Id.* at 2.

Transit and her reputation for being a "detail oriented person". Mr. Johnson noted that she is "detail oriented", the sort of person who noticed and commented upon the fact that the word "fraudulent" was misspelled in her discharge notice.[25] At the hearing, the Grievant agreed with that assessment. Further, her long service helped her to understand and use the Employer's system carefully. For example, during her employment with Metro Transit this was not the first time she had two FMLA certificates for different health conditions, and there was no evidence she had past inadvertent errors. Her absentee history also demonstrates that when the number of chargeable occurrences reached the limit allowed, and she received a final warning, she was not absent again for three months, avoiding discharge under the policy.[26]

Grievant's best argument that her actions were inadvertent is that a reasonable person who knew that Certificate 7900 (back) had expired would have called in sick claiming depression instead of back pain and no question of fraud would have arisen. This argument is somewhat persuasive, but standing alone, it does not outweigh the Employer's evidence. The Grievant knew or should have known which certificate number applied to each health condition and chose to use Number 7915 (depression) when Number 7900 (back condition) had expired in order to avoid discharge for absenteeism. These facts are sufficient to establish intentional misuse of leave.

B. Violation of Metropolitan Council Drug Policy Pages 4-6 above, set out relatively undisputed facts that establish a violation of the Employer's Rules and Policies. The Grievant admits that she worked as a bus operator while taking OxyContin and Percocet. She did not submit a form with a doctor's evaluation of whether the prescribed

[25] T., M. Johnson.
[26] Employer's Exhibit 23 and T., M. Johnson.

medication would affect her work as specifically required by Rule 473 and the Drug Policy. The Grievant claims that she turned in a doctor's prescription for Percocet dated April 6, 2005[27], and this was substantial compliance with the Rule and Policy. A great deal of testimony was taken regarding this matter. Management employees stated the form and the attached prescription were not in the files prior to discharge and implied that the Grievant had inserted them after the fact. The Union argued the documents had been there all along. It is not necessary to make a finding on this issue, because the prescription, even had it been available to those who made the discharge decision, was not sufficient to meet the requirements of the Employer's Drug Policy. The employee should have regularly filled out a form each time she had a new prescription, it should have covered both narcotics she was taking, and it should have contained a doctor's evaluation of whether the prescribed medication would affect her work. The disputed document does not do so. Without expert medical evidence to the contrary, the Employer can assume based on general knowledge, that driving while taking a morphine based drug is likely to be inimical to the public safety. When employees are in a "safety sensitive" job like operating public transportation, those ingesting narcotic pain relievers should not be excused from strict compliance with the rules governing prescription drug use at work.

The other drug related violation is that the Grievant attempted to commit suicide by taking an overdose of morphine related drugs. She reported this incident to Mr. Johnson on or about March 6, 2006, but drove some shifts before doing so. When Mr. Johnson was advised of this, he instituted a last chance agreement with the Grievant.

The timing of Mr. Johnson's decision to enter into a last chance agreement with the Grievant on March 15 prior to discharging her on March 31 raises some questions,

[27] Employer's Exhibit 7.

but discharge after the investigation concluded March 31 is not unfair and unreasonable if the Employer learned additional facts that weighed against a continued employment relationship.[28]

When Mr. Johnson signed the last chance agreement, he knew that the Grievant had been hospitalized for a drug overdose March 2006, he knew this was her second self-report of an overdose and that in 2000, she had entered into a last chance agreement. He knew that two bus operators had come forward reluctantly to express their concern to management about Grievant's driving while taking prescription narcotics. Mr. Johnson believed he had authority to discharge her at that time[29], but did not do so, because an investigation into her FMLA use had commenced the day before. Mr. Johnson had decided to investigate FMLA allegations by asking Katie Shea, of the Metropolitan Council, to audit the Grievant's absence records.

Ms. Shea interviewed the Grievant on March 31, and Mr. Johnson was present. At the interview, Ms. Shea gave the Grievant a *Garrity* warning and took extensive notes of the Grievant's responses to questions. The notes were transcribed and are part of the record, as Employer Exhibit 16. Both Ms. Shea and Mr. Johnson testified the transcription was accurate.[30] At the interview, Ms. Shea questioned the Grievant about the drug issues. The Grievant admitted she had engaged in the following conduct:

a. Stealing narcotic drugs from Walgreen's when she worked there.[31]
b. Attempting suicide by overdosing on morphine that she stole from Walgreen's.
c. Driving Metro Transit busses while taking OxyContin and Vicodin.

[28] The agreement with the Grievant had no termination date, and is signed by the Grievant but not the Union.
[29] T., M. Johnson
[30] T., M. Johnson, K. Shea.
[31] Termination from employment at Walgreen's is off-duty conduct that I considered only when weighing the Grievant's veracity as a witness and as an employee, not as a substantive reason for discharge here.

d. Failing to file doctor's reports with the Employer that the drugs and the dosage she was taking would not affect her driving.[32]

Ms. Shea's investigation also concluded that the Grievant had taken nine days of FMLA leave for her back problem to which she was not entitled, and that the Grievant was not able to explain satisfactorily why she continued requesting FMLA leave for back pain after she had been denied a new certificate in February.

All of these admissions and findings were considered by management employees who participated in the decision to discharge the Grievant, and Mr. Johnson was not aware of all this information when he entered into the agreement with the Grievant. The Employer's decision to terminate the agreement and discharge the Grievant based on the findings of the investigation is not unreasonable.

The Grievant testified that she loved her job as a bus operator, that she was good at the job, and that she wanted to return to it. She stated she is currently drug free and, essentially, that she is not dangerous to the public or to the Employer's enterprise. This return to work argument cannot prevail, and the alternative remedy requested by the Union is denied.

CONCLUSION

The Employer's first priority is to provide reliably safe transportation to the public. Its Rules for bus operators who are taking prescription narcotics are reasonable within this framework, and violating Rule No. 473 is a dischargeable offense. The Employer established by a preponderance of the evidence that Grievant violated this Rule and its accompanying policy. The Employer also presented sufficient evidence to show

[32]Shea interview of Grievant, March 31, 2006, Employer Exhibit 16.

that the Grievant gave false information to her employer by claiming FMLA time off for an ineligible condition.

AWARD

The Grievance is denied.

November 20, 2006

Andrea Mitau Kircher
Arbitrator